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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

CAPITOL RECORDS, INC.; CAROLINE
RECORDS, INC.; EMI CHRISTIAN MUSIC
GROUP INC.; PRIORITY RECORDS LLC;
VIRGIN RECORDS AMERICA, INC.;
BEECHWOOD MUSIC CORP.; COLGEMS-EMI
MUSIC INC; EMI APRIL MUSIC INC.; EMI
BLACKWOOD MUSIC; EMI FULL KEEL
MUSIC; EMI GOLDEN TORCH MUSIC CORP.;
EMI LONGITUDE MUSIC; EMI VIRGIN MUSIC,
INC.; EMI VIRGIN SONGS, INC.;

Plaintiffs,

v.

MP3TUNES, LLC and MICHAEL ROBERTSON

Defendants.

CIVIL ACTION NO. 07-Civ. 9931 (WHP)

DECLARATION OF MICHELLE A.
HON IN SUPPORT OF OPPOSITION
TO DEFENDANT'S MOTION TO
DISMISS

I, Michelle A. Hon, declare:

1. I am an attorney licensed to practice in the State of California and I am admitted *pro hac vice* before this Court. I am an attorney with the law firm Duane Morris LLP, counsel for defendants MP3tunes, LLC ("MP3tunes") and Michael Robertson. I have personal knowledge of the matters stated herein, and if called as a witness, I could and would testify competently to them.

2. I submit this Declaration in support of defendants' Motion to Dismiss.

3. A search of the California Secretary of State website shows that the corporations listed in the action, are either California corporations or registered to do business in California. Attached hereto as Exhibit A are true and correct copies of the search results from the California Secretary of States for the following corporations: Capital Records, Inc.; Caroline Records, Inc.; EMI Christian Music Group Inc.; Priority Records LLC; Virgin Records America, Inc.; Beechwood Music Corp.; Colgems-EMI Music, Inc.; EMI April Music Inc.; EMI Blackwood Music; EMI Golden Torch Music Corp.; EMI Virgin Music, Inc.; EMI Virgin Songs, Inc.

4. Excluded from the enumerated list above, but plaintiffs in this action are, EMI Full Keel Music and EMI Longitude Music. These companies are listed in the complaint in this action as "duly organized corporations," but with no statement as to where the companies are allegedly incorporated. A diligent search, which included a Dun and Bradstreet search, did not find any record of a corporation under either of these names.

5. According to EMI's website, available at <http://www.emigroup.com/About/Overview/Default.htm>, EMI claims to be the "world's leading independent music company." EMI also claims that it operates directly in 50 countries, with licensees in a further 20 countries. A true and correct copy of this EMI website is attached hereto as Exhibit B.

6. The EMI music catalog and EMI publishing catalog are listed on the EMI Group website at <http://www.emigroup.com/About/Music/EMI+Music+catalogue.htm> and <http://www.emigroup.com/About/Music/EMI+Music+Publishing+catalogue.htm> respectively.

7. MP3tunes filed a Complaint on September 20, 2007, seeking damages, costs and attorney's fees for the material misrepresentations of EMI and seeking declaratory relief that MP3tunes is a service provider as defined by the Digital Millennium Copyright Act ("DMCA"), that MP3tunes's conduct falls within the safe harbor provisions of the DMCA, that the notice provided by EMI was deficient, to the extent that such notice was not deficient, that MP3tunes complied with its obligations under the DMCA, and that MP3tunes' conduct did not constitute copyright infringement. The Complaint was served on October 23, 2007.

8. MP3tunes named EMI Music North America, EMI Group North America and EMI Group Holdings North America as defendants in its original Complaint. These defendants did not dispute that they own the copyrights at issue. However, because individual record labels and publishers have alleged at least some interest in or to the EMI copyrights, on December 3, 2008 MP3tunes filed an Amended Complaint adding the individual record labels and publishers, facts and claims related to the October 25, 2007 cease and desist letters, and a cause of action under California Business & Professions Code § 17200. A true and correct copy of the Amended Complaint as filed is attached hereto as Exhibit C.

I declare under penalty under the laws of the United States of America that the foregoing is true and correct.

Executed this 22nd day of February, 2008 at San Diego, California.

s/Michelle A. Hon
Michelle A. Hon

EXHIBIT A

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Corporations

The information displayed here is current as of "NOV 23, 2007" and is updated weekly. It is not a complete or certified record of the Corporation.

Corporation		
CAPITOL RECORDS, INC.		
Number: C0229996	Date Filed: 8/20/1948	Status: active
Jurisdiction: DELAWARE		
Address		
150 FIFTH AVE		
NEW YORK, NY 10011		
Agent for Service of Process		
THE PRENTICE-HALL CORPORATION SYSTEM, INC.		
PO BOX 525036		
SACRAMENTO, CA 95862		

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- For information about certification of corporate records or for additional corporate information, please refer to Corporate Records.
- Blank fields indicate the information is not contained in the computer file.
- If the status of the corporation is "Surrender", the agent for service of process is automatically revoked. Please refer to California Corporations Code Section 2114 for information relating to service upon corporations that have surrendered.

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Corporation		
CAROLINE RECORDS, INC.		
Number: C2642864	Date Filed: 3/22/2004	Status: active
Jurisdiction: NEW YORK		
Address		
104 WEST 29TH ST NEW YORK		
NEW YORK, NY 10001		
Agent for Service of Process		
THE PRENTICE-HALL CORPORATION SYSTEM, INC.		
PO BOX 526036		
SACRAMENTO, CA 95852		

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Corporation		
EMI CHRISTIAN MUSIC GROUP INC.		
Number: C0850956	Date Filed: 8/23/1977	Status: active
Jurisdiction: California		
Address		
2751 CENTERVILLE RD STE 205		
WILMINGTON, DE 19808		
Agent for Service of Process		
THE PRENTICE-HALL CORPORATION SYSTEM, INC.		
PO BOX 526036		
SACRAMENTO, CA 95852		

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LP/LLC

The information displayed here is current as of "Nov 23, 2007" and is updated weekly. It is not a complete or certified record of the Limited Partnership or Limited Liability Company.

LP/LLC		
PRIORITY RECORDS, LLC		
Number: 199631010034	Date Filed: 11/5/1996	Status: active
Jurisdiction: DELAWARE		
Address		
1750 N VINE ST		
HOLLYWOOD, CA 90028		
Agent for Service of Process		
THE PRENTICE-HALL CORPORATION SYSTEM INC		
C0257078		

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- Fees and instructions for requesting certification of limited partnership and/or limited liability company records are included on the Business Entities Records Order Form.
- Blank fields indicate the information is not contained in the computer file.
- If the agent for service of process is a corporation, the address of the agent may be requested by ordering a status report. Fees and instructions for ordering a status report are included on the Business Entities Records Order Form.

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Corporation		
VIRGIN RECORDS AMERICA, INC.		
Number: C1380832	Date Filed: 7/21/1986	Status: active
Jurisdiction: California		
Address		
150 FIFTH AVE 2ND FLR		
NEW YORK, NY 10011		
Agent for Service of Process		
THE PRENTICE-HALL CORPORATION SYSTEM, INC.		
PO BOX 526036		
SACRAMENTO, CA 95852		

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Corporation		
BEECHWOOD MUSIC CORPORATION		
Number: C0191306	Date Filed: 9/16/1942	Status: active
Jurisdiction: California		
Address		
810 7TH AVE 36TH FL		
NEW YORK, NY 10019		
Agent for Service of Process		
THE PRENTICE-HALL CORPORATION SYSTEM, INC.		
PO BOX 526036		
SACRAMENTO, CA 95852		

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Corporation		
COLGEMS-EMI MUSIC, INC.		
Number: C0778259	Date Filed: 9/2/1976	Status: active
Jurisdiction: DELAWARE		
Address		
810 7TH AVE 36TH FL.		
NEW YORK, NY 10019		
Agent for Service of Process		
THE PRENTICE-HALL CORPORATION SYSTEM, INC.		
PO BOX 526086		
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Corporation		
EMI APRIL MUSIC INC.		
Number: C0800838	Date Filed: 10/15/1976	Status: active
Jurisdiction: CONNECTICUT		
Address		
810 7TH AVE 36TH FL		
NEW YORK, NY 10019		
Agent for Service of Process		
THE PRENTICE-HALL CORPORATION SYSTEM, INC.		
PO BOX 526036		
SACRAMENTO, CA 95852		

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Corporation		
EMI BLACKWOOD MUSIC INC.		
Number: C0800837	Date Filed: 10/15/1976	Status: active
Jurisdiction: CONNECTICUT		
Address		
810 7TH AVE 36TH FL		
NEW YORK, NY 10019		
Agent for Service of Process		
THE PRENTICE-HALL CORPORATION SYSTEM, INC.		
PO BOX 526036		
SACRAMENTO, CA 95852		

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Corporation		
EMI GOLDEN TORCH MUSIC CORP.		
Number: C0536666	Date Filed: 11/28/1967	Status: active
Jurisdiction: NEW YORK		
Address		
76 NINTH AVE 4TH FL		
NEW YORK, NY 10011		
Agent for Service of Process		
THE PRENTICE-HALL CORPORATION SYSTEM, INC.		
PO BOX 526036		
SACRAMENTO, CA 95852		

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Corporation		
EMI VIRGIN MUSIC, INC.		
Number: C1611356	Date Filed: 4/13/1988	Status: active
Jurisdiction: NEW YORK		
Address		
810 7TH AVE 36TH FL		
NEW YORK, NY 10019		
Agent for Service of Process		
THE PRENTICE-HALL CORPORATION SYSTEM, INC.		
PO BOX 628036		
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EXHIBIT B



EMI is the world's leading independent music company. It operates directly in 50 countries, with licensees in a further 20 and employs around 5,500 people. For the year ended 31 March 2007, EMI Group reported revenue of £1,751.5 million and £62.7 million in underlying profit before tax. In August 2007 EMI was acquired by private equity firm Terra Firma.

The company comprises two divisions – EMI Music, one of the top global recorded music companies, and EMI Music Publishing, one of the world's leading music publishers.

As an owner of digital music content, EMI is extremely well positioned to capitalise on the rapid growth of digital music. EMI's strategy is to deliver music to consumers in any form, at any time and in any place. During the year ended 31 March 2007, EMI Group's digital revenues grew from £112.1 million to £164.2 million, representing 9.4% of total underlying revenue.

EMI Music represents recording artists spanning all musical tastes and genres and owns one of the finest catalogues of recorded music ever assembled with over three million individual tracks. The company's roster and catalogue includes world famous stars and developing artists such as Lily Allen, Corinne Bailey Rae, The Beach Boys, The Beatles, Dierks Bentley, Coldplay, Diam's, Depeche Mode, Gorillaz, Norah Jones, The Kooks, Korn, Lenny Kravitz, Kylie, Pink Floyd, Raphael, RBD, Joss Stone, The Rolling Stones, 30 Seconds To Mars, KT Tunstall, Keith Urban, Utada Hikaru and Robbie Williams plus some of the world's finest classical artists including Nigel Kennedy, Simon Rattle, Itzhak Perlman and Angela Gheorghiu.

EMI Music's record labels include Angel, Astralwerks, Blue Note, Capitol, Capitol Nashville, EMI, EMI Classics, EMI CMG, EMI Televisa Music, Mute, Parlophone and Virgin. With around 4,800 employees worldwide, EMI Music's revenue in the year ended 31 March 2007 was £1,350.2 million.

EMI Music Publishing owns one of the largest catalogues of songs in the world, containing more than a million contemporary and classic titles. Its roster of songwriters is unparalleled and the company has won and continues to win more industry accolades and publisher of the year awards than any other music publisher. Its catalogue of best-selling songs includes *Bohemian Rhapsody*, *I Heard It Through The Grapevine*, *New York, New York*, *Over the Rainbow*, the *James Bond* theme, *Singin' In The Rain*, *Santa Claus is Comin' to Town*, *Wild Thing*, *We Will Rock You*, *Angels*, *Baby Love*, *Crazy in Love* and *Daydream Believer* and is home to many of the world's best songwriters including Arolic Monkeys, James Blunt, Cathy Dennis, Jay-Z, Alicia Keys, Pink, Usher, Kanye West and Amy Winehouse.

With offices all around the world, EMI Music Publishing has about 640 staff and in the year ended 31 March 2007 generated £401.3 million in revenue.

For an illustration of how record labels and publishing companies fit into

the structure of the music business please click [here](#).

EMI Group Limited registered office:

27 Wrights Lane
London W8 5SW
Registered in England No. 229231

Last updated October 2007

EXHIBIT C

Case 3:07-cv-01844-JH-NLS Document 17 Filed 12/13/2007 Page 1 of 17

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 Michelle Hon (SBN 234492)
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 Facsimile: 619.744.2201
 E-Mail: emcramp@duanemorris.com
 mhon@duanemorris.com

Attorneys for Plaintiff MP3TUNES, LLC

UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

MP3TUNES, LLC,

Plaintiff,

v.

EMI GROUP, LTD; EMI GROUP NORTH
 AMERICA, INC.; EMI GROUP NORTH
 AMERICA HOLDINGS, INC.; and EMI MUSIC
 NORTH AMERICA, LLC; CAPITOL RECORDS,
 INC.; CAROLINE RECORDS, INC.; EMI
 CHRISTIAN MUSIC GROUP INC.; PRIORITY
 RECORDS LLC; VIRGIN RECORDS AMERICA,
 INC.; BEECHWOOD MUSIC CORP.; COLGEMS-
 EMI MUSIC INC.; EMI APRIL MUSIC INC.; EMI
 BLACKWOOD MUSIC; EMI FULL KEEL
 MUSIC; EMI GOLDEN TORCH MUSIC CORP;
 EMI LONGITUDE MUSIC; EMI VIRGIN MUSIC,
 INC.; EMI VIRGIN SONGS, INC.,

Defendants.

Case No.: 07CV1844WQH (NLS)

AMENDED COMPLAINT FOR
 DECLARATORY JUDGMENT AND
 VIOLATION OF THE DIGITAL
 MILLENNIUM COPYRIGHT ACT;
 VIOLATION OF CALIFORNIA
 BUSINESS AND PROFESSIONS CODE
 SECTION 17200; DEMAND FOR JURY
 TRIAL

Judge: William Q. Hayes
 Complaint Filed: September 20, 2007

Plaintiff MP3tunes, LLC ("Plaintiff"), by its attorneys, Duane Morris LLP, alleges on
 knowledge as to its own acts and otherwise upon information and belief as follows:

NATURE OF THE ACTION

1. As set forth in more detail below, Plaintiff MP3tunes, LLC ("MP3tunes") owns and
 operates MP3tunes.com and Sideload.com (collectively, the "Sites") and offers Oboe lockers and
 software to users of the Sites.

DMJ11232005.1

Case No. 07CV1844WQH (NLS)

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

1 2. MP3tunes.com is a music service provider and the home of Oboe, a personal music
2 locker offering unlimited online storage. Oboe users can sync their personal music collections to
3 enjoy their music through any web browser, as well as through a growing number of home
4 entertainment and mobile devices.

5 3. Sideload.com is a website owned and operated by MP3tunes that aggregates popular
6 free music tracks on the web chosen and posted by users of Sideload.com and/or Oboe.

7 4. MP3tunes feels justifiably threatened that it will be sued by Defendants as a result of
8 the foregoing websites and software because Plaintiff received three threatening – albeit deficient –
9 cease-and-desist letters from Defendants' counsel, dated September 4, 2007, September 18, 2007,
10 and October 25, 2007 (collectively, the "Notice") and because Plaintiff was informed by
11 Defendants' counsel that the matter would not be resolved without litigation unless there was a
12 substantial monetary payment by Plaintiff.

13 5. By this action, MP3tunes seeks a declaration that (i) MP3tunes.com and
14 Sideload.com are service providers as defined in the Digital Millennium Copyright Act ("DMCA"),
15 17 U.S.C. § 512(k); (ii) the conduct by MP3tunes.com and Sideload.com challenged by Defendants
16 in the Notice falls within the protections of §§ 512(a), (b), (c) and/or (d); (iii) the Notice served on
17 Plaintiff was deficient under 17 U.S.C. §§ 512(e) and/or (d); (iv) to the extent the Notice was not
18 deficient, Plaintiff complied with its obligations under 17 U.S.C. §§ 512(e) and/or (d); and (v) the
19 activities of Sideload.com, MP3tunes.com and Oboe complained of by Defendants in the Notice do
20 not constitute direct copyright infringement, contributory copyright infringement and/or inducement
21 of copyright infringement.

22 6. MP3tunes further seeks: (i) an order from the Court pursuant to California Business
23 and Professions Code §17200, et seq., enjoining the defendants from engaging in their unfair,
24 unlawful, and deceptive business act or practice of intentionally sending defective Notice under the
25 DMCA in order to further their business interests; (ii) an order from the Court requiring Defendants
26 to disgorge any profits that they have made as a result of their wrongful conduct; and (iii) an award
27 of attorney's fees and costs.

PARTIES

7. Plaintiff MP3tunes, LLC is a Delaware limited liability company with its principal place of business in San Diego, California.

8. Defendant EMI Group, LTD ("EMI LTD") is headquartered in London, England. EMI operates in the United States through its division, EMI Music Group North America, as well as subsidiaries EMI Group North America, Inc., EMI Group North America Holdings Inc. and EMI Music North America, LLC, among others. The record labels EMI purports to represent in the United States include the co-defendants listed in paragraphs 9 through 25 below.

9. Defendant EMI Group North America, Inc. ("EMI NA Inc.") is a Delaware corporation with its principal place of business in New York, New York, and transacts business in this district.

10. Defendant EMI Group North America Holdings Inc. ("EMI Holdings") is a Delaware corporation with its principal place of business in New York, New York, and transacts business in this district.

11. Defendant EMI Music North America, LLC ("EMI Music") is a Delaware limited liability company with its principal place of business in New York, New York, and transacts business in this district.

12. Defendant Capitol Records, Inc. is a Delaware corporation, with its principal place of business in New York, New York.

13. Defendant Caroline Records, Inc. is a New York corporation, with its principal place of business in New York, New York.

14. Defendant EMI Christian Music Group, Inc. is a California corporation, with its principal place of business in Brentwood, Tennessee.

15. Defendant Priority Records LLC is a Delaware limited liability company with its principal place of business in New York, New York.

16. Defendant Virgin Records America, Inc. is a California corporation, with its principal place of business in New York, New York.

17. Defendant Beechwood Music Corporation is a California corporation, with its

1 principal place of business in New York, New York.

2 18. Defendant Colgems-EMI Music Inc. is a Delaware corporation, with its principal
3 place of business in New York, New York.

4 19. Defendant EMI April Music Inc. is a Connecticut corporation, with its principal place
5 of business in New York, New York.

6 20. Defendant EMI Blackwood Music is a Connecticut corporation, with its principal
7 place of business in New York, New York.

8 21. Defendant EMI Full Keel Music is a duly organized corporation, with its principal
9 place of business in New York, New York.

10 22. Defendant Golden Torch Music Corp. is a New York corporation, with its principal
11 place of business in New York, New York.

12 23. Defendant EMI Longitude Music is a duly organized corporation, with its principal
13 place of business in New York, New York.

14 24. Defendant EMI Virgin Music, Inc. is a New York corporation, with its principal place
15 of business in New York, New York.

16 25. Defendant EMI Virgin Songs, Inc. is a New York corporation, with its principal place
17 of business in New York, New York.

18 26. Defendants are collectively referred to herein as "EMI" or "Defendants."

19 JURISDICTION AND VENUE

20 27. This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201 and Rule 57
21 of the Federal Rules of Civil Procedure seeking a declaration of rights and/or other legal relations of
22 the parties to this litigation with respect to a substantial controversy arising under the copyright laws
23 of the United States, 17 U.S.C. § 101 *et seq.* This action further seeks injunctive relief under
24 California Business and Professions Code section 17200, *et seq.*, prohibiting defendants from
25 engaging in unfair, illegal, and deceptive business acts and practices.

26 28. This Court has jurisdiction over the subject matter of this action pursuant to the
27 Copyright Act (17 U.S.C. § 101 *et seq.*); 28 U.S.C. §§ 1331, 1338; the Declaratory Judgment Act
28 (28 U.S.C. § 2201); and 28 U.S.C. § 1367.

29. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400(a) because Defendants transact business in this district. Moreover, Plaintiff resides in this district and/or the acts complained of herein have had, and will have, substantial effects in this district.

THE BUSINESS OF MP3TUNES

30. Plaintiff MP3tunes, LLC owns and operates MP3tunes.com and Sideload.com.

31. MP3tunes.com is a music service provider and the home of Oboe, a personal music locker offering unlimited online storage. Oboe users can sync their personal music collections to enjoy them through any web browser, as well as through a growing number of home entertainment and mobile devices.

32. MP3tunes.com does not control or select the songs in an individual consumer's locker and instead merely provides online storage space for such music. Consumers can organize, add and delete songs as they choose. While MP3tunes.com can identify the songs in a consumer's locker, it has no means of determining where the track came from (i.e. from another website, from a CD that the user owns or elsewhere). Only the individual consumer can access his or her own particular songs from the consumer's locker.

33. Sideload.com is a website owned and operated by Plaintiff that aggregates popular free music tracks on the web designated by users of the Sites. The songs listed on Sideload.com are designated and posted by users of the Sites. Consumers can also listen to songs on Sideload.com and "sideload" those tracks into their personal lockers, onto their hard drives or elsewhere. Plaintiff plays no role in which songs are designated for Sideload.com by users of the Sites. None of the songs designated by users for sideloading or listening are physically available on Sideload.com. Rather, what is provided is a hyperlink.

34. Until Plaintiff's recent receipt of Defendants' Notice (discussed below), Plaintiff believed that all of the songs on Sideload.com and in the consumer's personal lockers were non-infringing songs. Before using Sideload.com and MP3tunes.com, consumers must agree to the Terms of Use set forth on both websites, which states that the user "acknowledge[s] that by uploading music or any other content to the Site, or requesting that music or any content be uploaded to [the user's] account maintained on the Site, that [the user is] directing [Plaintiff] to store the file in

1 the format in which it is uploaded and to convert and store it in the MP3 format, or such other format
2 in which it may be converted by [Plaintiff]. [The user] agree[s] that [he/she] will not upload music
3 and content, and will not request that any music or content be uploaded to [her/her] account
4 maintained on the Site, that infringes the copyright or other intellectual property rights of any third
5 party."

6 35. The Terms of Use states further that "[u]nder the appropriate circumstances, it is
7 Plaintiff's policy to remove and/or to disable access from MP3tunes to web pages of repeat
8 infringers, to terminate subscribers and account holders who are repeat infringers, and to remove
9 and/or to disable access from MP3tunes to web pages as to which there have been steps taken for the
10 purpose of affecting MP3tunes's search results such as adding inappropriate 'meta-tags.'"

11 36. Thus, until recently, Plaintiff believed that all of the songs on Sideload.com and in the
12 consumer's personal lockers were non-infringing songs. Indeed, Plaintiff still believes that the songs
13 currently in the consumer's personal lockers are non-infringing and Plaintiff has no basis to believe,
14 and no means of determining, otherwise.

15 37. For the reasons set forth below, MP3tunes cannot continue to operate MP3tunes.com,
16 Sideload.com and the Oboe lockers without fear of crippling litigation until this action is resolved.

17 DEFENDANTS' ACTIONS

18 38. On September 4, 2007, September 18, 2007, and October 25, 2007, Defendants,
19 through their counsel, sent Notice, which was deficient under the DMCA, to Plaintiff alleging that
20 Plaintiff, through its websites MP3tunes.com and Sideload.com and its "Oboe Software Suite" "is
21 copying and storing to its servers, indexing, publicly performing, and making available for download
22 hundreds (if not thousands) of [Defendants'] copyrighted recordings in violation of the Copyright
23 Act." A true and correct copy of the Notice is attached hereto as Exhibit A.

24 39. The Notice is deficient for a number of reasons. First, it fails to identify the party
25 represented by Jenner & Block LLP sending the Notice. To the contrary, the Notice identifies only
26 divisions of Defendants, but not legal entities. To date, the EMI entity that served the deficient
27 Notice is unknown.

28 40. Second, the Notice falsely states that "[f]or a variety of reasons, MP3[t]unes is not

1 protected by any of the 'safe-harbors' of the Digital Millennium Copyright Act ('DMCA')". To the
2 contrary, MP3tunes.com and Sideload.com are service providers as defined in 17 U.S.C. § 512(k)
3 and their conduct falls within the enumerated categories of §§ 512(a), (b), (c) and/or (d).

4 41. Third, with the exception of approximately 350 songs about which Defendants
5 properly notified Plaintiff pursuant to 17 U.S.C. § 512(c)(3)(A)(ii) by enclosing a CD-ROM listing
6 the songs and website locations which Defendants alleged infringed the copyrights of EMI and/or
7 parties it allegedly represents, the remainder of the Notice was deficient. As to the songs that
8 Defendants properly identified on the list enclosed with the Notice, those songs were immediately
9 removed from Sideload.com and Defendants were promptly notified of this.

10 42. However, the Notice stated further that the "enclosed representative list reflects only
11 a small portion of the total number of infringing EMI works contained on MP3tunes, with more
12 being copied and made available daily. Accordingly, pursuant to 17 U.S.C. § 512(c)(3)(A)(ii), based
13 on EMI's representative list, MP3tunes is obligated to remove all of EMI's copyrighted works,
14 even those not specifically identified on the attached. A non-exhaustive further listing of EMI's
15 recording artists can be found at <http://www.emigroup.com/About/Music/Default.htm>."

16 43. This notification was inadequate under the DMCA. The Notice did not specifically
17 identify the material that is to be removed or access to which is to be disabled as required by 17
18 U.S.C. § 512(c)(3)(A)(iii).

19 44. Moreover, some of the artists on Defendants' list and/or on Defendants' website are
20 no longer represented by EMI; and some songs listed on the enclosure to the Notice are freely
21 available for digital download. For example, the first band that is listed in Defendants' spreadsheet
22 is "Air". MP3tunes features an "Air" track - "Once Upon A Time" - on the first page of
23 sideload.com. That track is from the popular online music magazine, *Filter*, and is accessed by the
24 URL <http://filter-mag.com/index.php?id=13977&c=6>. Thus, Plaintiff has no reason to believe that
25 the *Filter* track is anything but lawful. Nevertheless, Plaintiff removed this track from availability
26 for sideloading as per Defendants' demand.

27 45. Similarly, Defendants' list also includes the track "Nobody Move, Nobody Get Hurt"
28 by the band "We Are Scientists" from the URL http://media.spin.com/features/band_of_the_day/

1 audio/2005/11/nobody_move_nobody_get_hurt_hi.mp3. *Spin* is a popular online music magazine.
2 All the labels distribute MP3s promotionally. Plaintiff believes that it is likely that this track is such
3 a promotional distribution and is lawfully available. The same is true for the tracks that Defendants
4 list from the *Paste Store*, which is a store which often distributes promotional tracks provided to
5 them. Nevertheless, Plaintiff removed these tracks from availability for sideloading as per
6 Defendants' demand.

7 46. Defendants knowingly materially misrepresented that certain material on the Sites —
8 such as the aforementioned material — was infringing in violation of 17 U.S.C. § 512(f)(1) when it
9 was not.

10 47. By sending the Notice, Defendants engaged in an unfair, deceptive, or illegal business
11 act or practice in that they were aware that their conduct violated 17 U.S.C. § 512(f). Defendants
12 routinely illegally engage in such practices to illegally and unfairly further their business interests.
13 Defendants will not stop these illegal practices unless and until they are enjoined by the Court.

14 48. Defendants' Notice was only directed towards tracks on Sideload.com, although it
15 sought relief with respect to Obce and consumers' lockers on MP3tunes.com. The list enclosed with
16 the Notice only specified allegedly infringing tracks that could be removed from Sideload.com and
17 did not specify any possible infringements within individual consumers' lockers.

18 49. The Sites are fully protected by the DMCA.

19 50. In connection with the transmitting, routing, or providing connections for, material
20 through the Sites controlled by Plaintiff, or by reason of the intermediate and transient storage of that
21 material in the course of such transmitting, routing or providing connections, the transmission of the
22 material found on the Sites is not initiated by or at the direction of Plaintiff and instead is initiated at
23 the direction of the user.

24 51. In connection with the transmitting, routing, or providing connections for, material
25 through the Sites controlled by Plaintiff, or by reason of the intermediate and transient storage of that
26 material in the course of such transmitting, routing or providing connections, the transmission,
27 routing, provision of connections, or storage of the material found on the Sites is carried out through
28 an automatic technical process without selection of the material by Plaintiff.

1 52. In connection with the transmitting, routing, or providing connections for, material
2 through the Sites controlled by Plaintiff, or by reason of the intermediate and transient storage of that
3 material in the course of such transmitting, routing or providing connections, Plaintiff does not select
4 the recipients of the material on its Sites, except as an automatic response to the request of another
5 person.

6 53. In connection with the transmitting, routing, or providing connections for, material
7 through the Sites controlled by Plaintiff, or by reason of the intermediate and transient storage of that
8 material in the course of such transmitting, routing or providing connections, no copy of the material
9 made by Plaintiff in the course of its intermediate and transient storage of the material on its Sites is
10 maintained on the system or network in a manner ordinarily accessible to anyone other than the
11 anticipated recipients, and no such copy is maintained on the system or network in a manner
12 ordinarily accessible to such anticipated recipients for a longer period than is reasonably necessary
13 for the transmission, routing, or provision of connections.

14 54. In connection with the transmitting, routing, or providing connections for, material
15 through the Sites controlled by Plaintiff, or by reason of the intermediate and transient storage of that
16 material in the course of such transmitting, routing or providing connections, the material on
17 Plaintiff's Sites is transmitted through the system or network without modification of its content.

18 55. In connection with the transmitting, routing, or providing connections for, material
19 through the Sites controlled by Plaintiff, or by reason of the intermediate and transient storage of that
20 material in the course of such transmitting, routing or providing connections, the material on
21 Plaintiff's Sites is made available online by a person or website other than Plaintiff's Sites.

22 56. The intermediate and temporary storage of the material on the Sites is transmitted
23 from a person or website other than Plaintiff through the system or network to a user at the direction
24 of the user.

25 57. The intermediate and temporary storage of the material on the Sites is carried out
26 through an automatic technical process for the purpose of making the material available to users of
27 the system or network who, after the material is transmitted as described above, request access to the
28 material from the person described above.

1 58. The intermediate and temporary storage of the material on the Sites is transmitted to
2 the subsequent users without modification to its content from the manner in which the material was
3 transmitted from the person or website described above.

4 59. When Plaintiff learns the person or website set forth above has made material
5 available online without the authorization of the copyright owner of the material, Plaintiff responds
6 expeditiously to remove, or disable access to, the material that is claimed to be infringing upon
7 notification of claimed infringement.

8 60. Before receiving the Notice, Plaintiff did not have actual knowledge that the material
9 posted and/or stored on the Sites at the direction of users was infringing.

10 61. Plaintiff does not now have actual knowledge that the material posted and/or stored
11 on the Sites at the direction of users was infringing.

12 62. Before receiving the Notice, Plaintiff was not aware of facts or circumstances relating
13 to the material posted and/or stored on the Sites at the direction of users from which infringing
14 activity is apparent.

15 63. Plaintiff is not now aware of facts or circumstances relating to the material posted
16 and/or stored on the Sites at the direction of users from which infringing activity is apparent.

17 64. Upon obtaining knowledge or awareness that the material posted and/or stored on the
18 Sites at the direction of users is infringing, Plaintiff acts expeditiously to remove, or disable access
19 to, the allegedly infringing material and did so in this instance.

20 65. Plaintiff does not receive a financial benefit directly attributable to the material posted
21 and/or stored on the Sites at the direction of users and Plaintiff does not have the right and ability to
22 control such activity, other than to terminate the user's ability to use the Sites.

23 66. Upon notification of claimed infringement as described in 17 U.S.C. § 512(c)(3) as to
24 the material posted and/or stored on the Sites at the direction of users, Plaintiff responds
25 expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the
26 subject of infringing activity and has done so in this instance.

27 67. Plaintiff has designated an agent to receive notifications of claimed infringement
28 described in 17 U.S.C. § 512(c)(3).

68. When Plaintiff receives a notification that includes substantially the following it expeditiously complies with its obligations under the DMCA: (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed; (ii) identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site; (iii) identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material; (iv) information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted; (v) a statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law; and (vi) a statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

69. Plaintiff does not now have actual knowledge that the Sites link users to online locations containing infringing material or activity and did not have such knowledge before receiving the Notice. When Plaintiff has such knowledge, Plaintiff acts expeditiously to remove, or disable access to, the material and did so in this instance.

70. Plaintiff is not now aware of facts or circumstances from which it is apparent that the Sites link users to online locations containing infringing material or activity and was not aware of such facts or circumstances before receiving the Notice. When Plaintiff becomes aware of such facts or circumstances, Plaintiff acts expeditiously to remove, or disable access to, the material and did so in this instance.

71. Plaintiff does not receive a financial benefit directly attributable to any link to online locations containing infringing material and Plaintiff does not have the right and ability to control such activity absent the overbroad termination of the user's ability to use the Sites.

72. Upon notification of claimed infringement as described in 17 U.S.C. § 512(c)(3) as to

1 any links the Sites have to online locations containing infringing material, Plaintiff responds
2 expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the
3 subject of infringing activity and has done so in this instance.

4 73. Plaintiff is an entity offering the transmission, routing, or providing of connections
5 for digital online communications, between or among points specified by a user, of material of the
6 user's choosing, without modification to the content of the material as sent or received and/or a
7 provider of online services or network access, or the operator of facilities therefor.

8 74. Plaintiff did not and does not (1) directly infringe Defendants' copyrights; (2) have
9 knowledge of any infringement of Defendants' copyrights; or (3) make a material contribution to
10 any infringement of Defendants' copyrights.

11 75. Plaintiff did not and does not set up its Sites with the intent to encourage copyright
12 infringement.

13 76. After receiving the Notice, despite its deficiencies, Plaintiff contacted Defendants'
14 counsel and was informed that the matter was unlikely to be settled absent a substantial monetary
15 payment.

16 77. In response to the Notice, on September 13, 2007, Plaintiff's counsel responded by:
17 (i) notifying Defendants that its Notice was deficient (ii) notifying Defendants that the
18 approximately 350 songs about which Defendants properly notified Plaintiff about had been
19 removed from Sideload.com; and (iii) requesting that Defendants send a list of additional tracks to
20 which EMI (and the labels it purports to represent) own the copyrights, provide information
21 reasonably sufficient to permit Plaintiff to locate the material, and accurately represent that the listed
22 tracks are not legally digitally available for copying (along with the remaining required elements of
23 17 U.S.C. § 512(c)(3)(A)), so that Plaintiff could disable those songs from sideloading as well. A
24 true and correct copy of this letter is attached hereto as Exhibit B.

25 78. On September 18, 2007, in response to the aforementioned letter, Defendants'
26 counsel responded by claiming that Plaintiff's interpretation of the DMCA was wrong and that if
27 "MP3tunes has made an informed decision to litigate the issue of its copyright liability, so be it."
28 See Exhibit A.

79. As a result, there exists a substantial controversy between Plaintiff and Defendants as to whether Plaintiff's activities on MP3tunes.com, Sideload.com and Oboe will subject it to liability to Defendants for copyright infringement.

FIRST CLAIM FOR RELIEF
(DECLARATORY JUDGMENT)

80. MP3tunes repeats and realleges paragraphs 1 through 73 above, as if fully set forth herein.

81. Declaratory relief is warranted because the facts herein show that there is a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant relief. Specifically, there exists a substantial controversy between Plaintiff and Defendants as to whether Plaintiff's activities constitute direct or indirect copyright infringement.

82. Accordingly, Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 and Rule 57 of the Federal Rules of Civil Procedure that: (i) MP3tunes.com and Sideload.com are service providers as defined in the DMCA, 17 U.S.C. § 512(k); (ii) the conduct by MP3tunes.com and Sideload.com challenged by Defendants in the Notice falls within the protections of §§ 512(a), (b), (c) and/or (d); (iii) the Notice served on Plaintiff was deficient under 17 U.S.C. §§ 512(c) and/or (d); (iv) to the extent the Notice was not deficient, Plaintiff complied with its obligations under 17 U.S.C. §§ 512(c) and/or (d); and (v) the activities of Sideload.com, MP3tunes.com and Oboe complained of by Defendants in the Notice do not constitute direct copyright infringement, contributory copyright infringement and/or inducement of copyright infringement.

SECOND CLAIM FOR RELIEF
(VIOLATION OF THE DMCA, 17 U.S.C. § 512(f))

83. MP3tunes repeats and realleges paragraphs 1 through 76 above, as if fully set forth herein.

84. In its Notice, Defendants knowingly materially misrepresented that certain material on the Sites was infringing in violation of 17 U.S.C. § 512(f)(1) when it was not.

85. Plaintiff has been injured by Defendants' misrepresentations because (1) it relied upon such misrepresentations and removed or disabled access to the allegedly infringing material;

1 and (2) Plaintiff was forced to bring this action as a result of the inaccuracies and deficiencies in
2 Defendants' Notice.

3 86. Pursuant to 17 U.S.C. § 512(f), as a result of such knowing material
4 misrepresentations, Defendants shall be liable for any damages, including costs and attorneys' fees,
5 incurred by Plaintiff.

6 **THIRD CLAIM FOR RELIEF**
7 **(VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200, ET SEQ.)**

8 87. MP3tunes repeats and realleges paragraphs 1 through 86 above, as if fully set forth
9 herein.

10 88. The Defendants' acts hereinabove alleged are acts of unfair, unlawful, or deceptive
11 business acts or practices within the meaning of Business and Professions Code Section 17200, et
12 seq.

13 89. Plaintiff is informed and believes that the Defendants will continue to do those acts
14 unless the Court orders them to cease and desist.

15 WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in its favor and
16 against Defendants, as follows:

17 A. On the First Claim for Relief, a declaratory judgment that:

18 (i) MP3tunes.com and Sideload.com are service providers as defined in the
19 DMCA, 17 U.S.C. § 512(c);

20 (ii) the conduct by MP3tunes.com and Sideload.com challenged by Defendants in
21 the Notice falls within the protections of §§ 512(a), (b), (c) and/or (d);

22 (iii) the Notice served on Plaintiff was deficient under 17 U.S.C. §§ 512(c) and/or
23 (d);

24 (iv) to the extent the Notice was not deficient, Plaintiff complied with its
25 obligations under 17 U.S.C. §§ 512(c) and/or (d); and

26 (v) the activities of Sideload.com, MP3tunes.com and Oboe complained of by
27 Defendants in the Notice do not constitute direct copyright infringement, contributory copyright
28 infringement and/or inducement of copyright infringement; and

1 B. On the Second Claim for Relief, awarding Plaintiff its damages, including its
2 costs and attorneys' fees pursuant to 17 U.S.C. § 512(f)(1); and

3 C. On the Third Claim for Relief:

4 (i) entering a temporary and permanent injunction prohibiting Defendants and the
5 Defendants' agents, servants, and employees, and all persons acting under or in concert with them,
6 to cease and desist from engaging in unfair, unlawful, or deceptive business acts or practices as
7 herein alleged in violation of California Business and Professions Code §17200, et seq.;

8 (ii) ordering defendants to disgorge any profits that they have earned as a result of
9 their illegal activities;

10 (iii) awarding Plaintiff its actual damages;

11 (iv) an additional award to Plaintiff of treble damages according to statute; and

12 (v) awarding Plaintiff its costs and attorneys' fees.

13 D. Granting Plaintiff such other, further and different relief as the nature of the
14 case may require or as may be determined to be just, equitable, and proper by this Court.

15 Dated: December 3, 2007 DUANE MORRIS LLP

16
17 By: s/Edward M. Cramp
18 Edward M. Cramp
19 Michelle Hon
20 Attorneys for MP3TUNES, LLC

21 JURY DEMAND

22 Plaintiff demands a trial by jury on all issues so triable.

23
24 Dated: December 3, 2007 DUANE MORRIS LLP

25
26 By: s/Edward M. Cramp
27 Edward M. Cramp
28 Michelle Hon
Attorneys for MP3TUNES, LLC

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5
 6 Attorneys for MP3TUNES, LLC

7 UNITED STATES DISTRICT COURT
 8 SOUTHERN DISTRICT OF CALIFORNIA
 9

10 MP3TUNES, LLC,

11
 12 Plaintiff,

13 v.

14 EMI GROUP, LTD; et al.,

15
 16 Defendants.
 17

Case No.: 07CV1844WQH (NLS)

DECLARATION OF SERVICE

Judge: William Q. Hayes
 Complaint Filed: September 20, 2007

18 I am a resident of the state of California, I am over the age of 18 years, and I am not a party
 19 to this lawsuit. My business address is 101 West Broadway, Suite 900, San Diego, California
 20 92101. On the date listed below, I served the document(s) entitled: AMENDED COMPLAINT
 21 FOR DECLARATORY JUDGMENT AND VIOLATION OF THE DIGITAL MILLENNIUM
 22 COPYRIGHT ACT; VIOLATION OF CALIFORNIA BUSINESS AND PROFESSIONS
 23 CODE SECTION 17200; DEMAND FOR JURY TRIAL.
 24

25 ☒ via electronic service to the attorneys of record on file with the U.S. District Court for this
 26 case, as follows:
 27
 28

DM111240526.1

DECLARATION OF SERVICE

07CV1844WQH (NLS)

Attorneys for Plaintiff

1 Bennett Bigman
bbigman@dsklip.com
2 DREIER STEIN & KAHAN LLP
1620 26th Street
3 Sixth Floor, North Tower
Santa Monica, CA 90404-4060
4 (310) 828-9050
(310) 828-9101
5

6 I declare under penalty of perjury under the laws of the State of California that the above is
7 true and correct.

8 Executed December 3, 2007, at San Diego, California.

9
10 
11 Diane M. Koski
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EXHIBIT A

JENNER & BLOCK

Jenner & Block
 1000 Pennsylvania Avenue, NW
 Suite 2000 South
 Washington, D.C. 20004
 Tel: 202 556-6600
 www.jennerg.com
 Steven A. Jenner
 Tel: 202 556-6600
 Fax: 202 556-6601
 sjenner@jennerg.com

VIA OVERNIGHT MAIL

September 4, 2007

MP3Tunes, LLC
 5960 Cornerstone Court
 First Floor
 San Diego, CA 92121

Attn: Emily Richards

Re: EMI Music Group/Infringement of Copyrighted Works

Dear Ms. Richards:

We are counsel for EMI Music Group North America, whose record labels include (but are not limited to) Capitol, Priority, Blue Note, BMG, Virgin, and Asylum (collectively, "EMI"). EMI is the owner of copyright, exclusive rights under copyright or related common law and statutory rights, in sound recordings. Among the recordings whose rights are owned by EMI are some of the most popular recordings in the world, including recordings by the Beatles, the Beach Boys, the Beach Boys, Coldplay, David Bowie, Norah Jones, Lenny Kravitz, Radiohead, the Red Hot Chili Peppers, Tina Turner, and many others.

MP3Tunes, through its websites, MP3Tunes.com and Sideload.com, and its "Obex Software Suite" (collectively, "MP3Tunes"), among other things, is copying and storing to its servers, indexing, publicly performing, and making available for download hundreds (if not thousands) of our client's copyrighted recordings in violation of the Copyright Act. For example, MP3Tunes.com provides (based on a user's search query) URL links to "source sites" that host unauthorized music files. Through the "Obex Software Suite" and the "Obex Sideload Plug-in," which MP3Tunes provides for no charge at MP3Tunes.com and Sideload.com, MP3Tunes' users can click a button MP3Tunes presents beside every link; when they do so, MP3Tunes automatically and instantly copies and "sideloads" the selected music from the source site into the user's Obex locker on the MP3Tunes.com website (which offers free storage and indexing of the user's "sideloaded" files). Thus, MP3Tunes unlawfully copies, and enables and induces its users to unlawfully copy, countless audio recordings of EMI artists, such as Coldplay's "Clocks" or Radiohead's "Karma Police." All of these unauthorized music files are available for download or immediate playback via the MP3Tunes.com website's proprietary integrated online audio player, and can be further transferred to most portable music devices, or copied to a compact disc. Searches using the names of virtually every other EMI artist returned similar results. However, EMI has not authorized any of its recordings to be copied, distributed, or performed in this manner on or by MP3Tunes or its users.

Barry Richards
September 4, 2007
Page 2

As we are certain that you are aware, the foregoing conduct constitutes copyright infringement under the United States Copyright Act and under laws of other countries, international law, and/or international treaty obligations. For a variety of reasons, MP3Tunes is not protected by any of the "safe-harbors" of the Digital Millennium Copyright Act ("DMCA").

Without waiver of this foregoing position and without conceding that MP3Tunes is entitled to any of the protections of the DMCA, including that it is a "Service Provider," fails within any of the enumerated categories of Section 512(c)-(d), or has effectively complied with any of the requirements contained therein, we are enclosing herewith a CD-ROM containing a spreadsheet identifying, by artist, song title and URL location, a representative sample, pursuant to 17 U.S.C. § 512(c)(3)(A)(ii), of EMI's copyrighted works that are copied, performed, stored, distributed, and made available for download on or by MP3Tunes. We demand that MP3Tunes immediately take the following actions with respect to each work identified in the attached spreadsheet: (1) remove or disable access to the work; (2) notify the MP3Tunes end user or uploader of the infringement(s); and (3) take appropriate action against the account holder pursuant to the MP3Tunes Terms of Use and End User Agreement. Please confirm in writing that you have done so. Additionally, please provide us with a complete accounting of all of the identified EMI recordings that have been copied, performed or distributed by MP3Tunes including the number of times each recording has been accessed by MP3Tunes users.

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The information in this notification is accurate and we have a good faith belief that use of the material in the manner complained of is not authorized by EMI, its respective agents, or the law. I further hereby state, under penalty of perjury, that we are authorized to act on behalf of EMI as set forth in this letter.

Bully Richards
September 4, 2007
Page 2

Your immediate attention to this letter is required. Nothing herein is intended to or shall be construed as a waiver of any of EMI's rights and remedies, all of which hereby are expressly reserved.

Very truly yours,


Steven D. Fabrizio

Enclosure

cc: Alexander McMillan, Esq.
Scott Bahrlber, Esq.
EMI Music North America

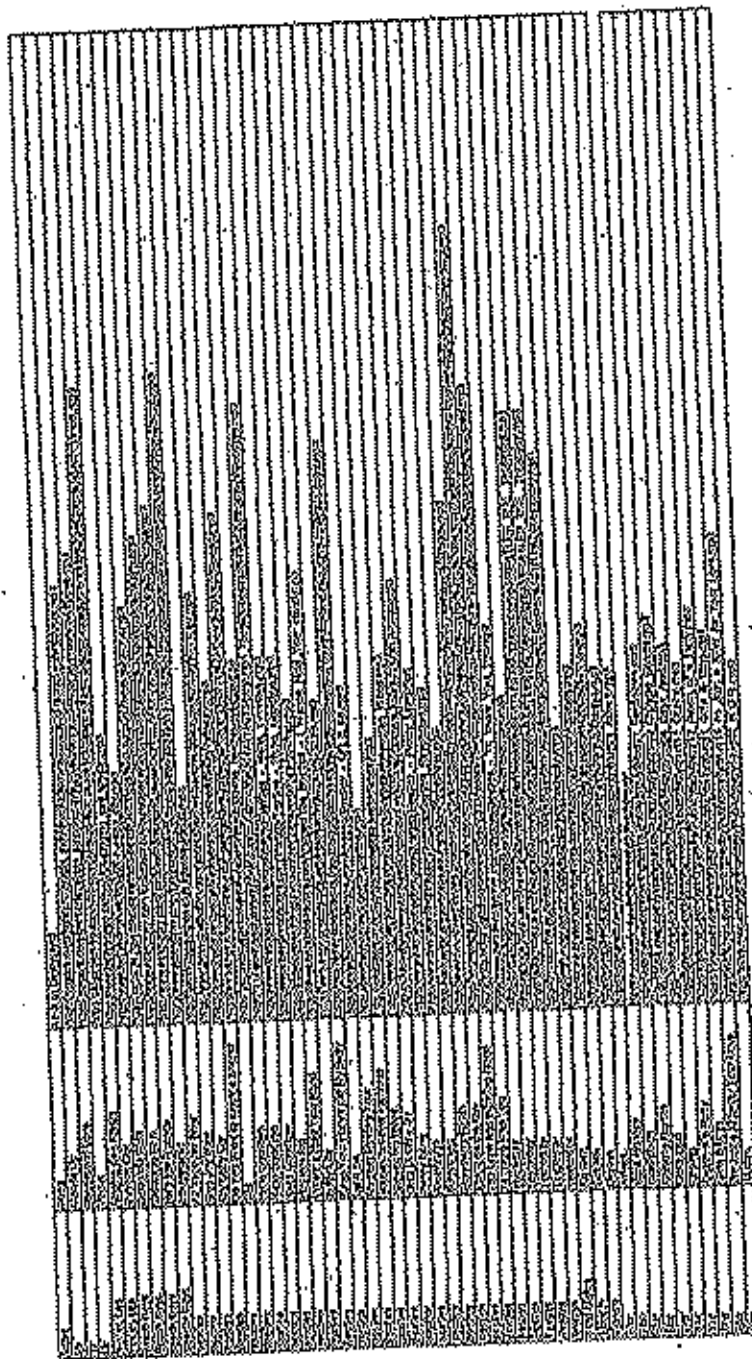


Exhibit A -- 04

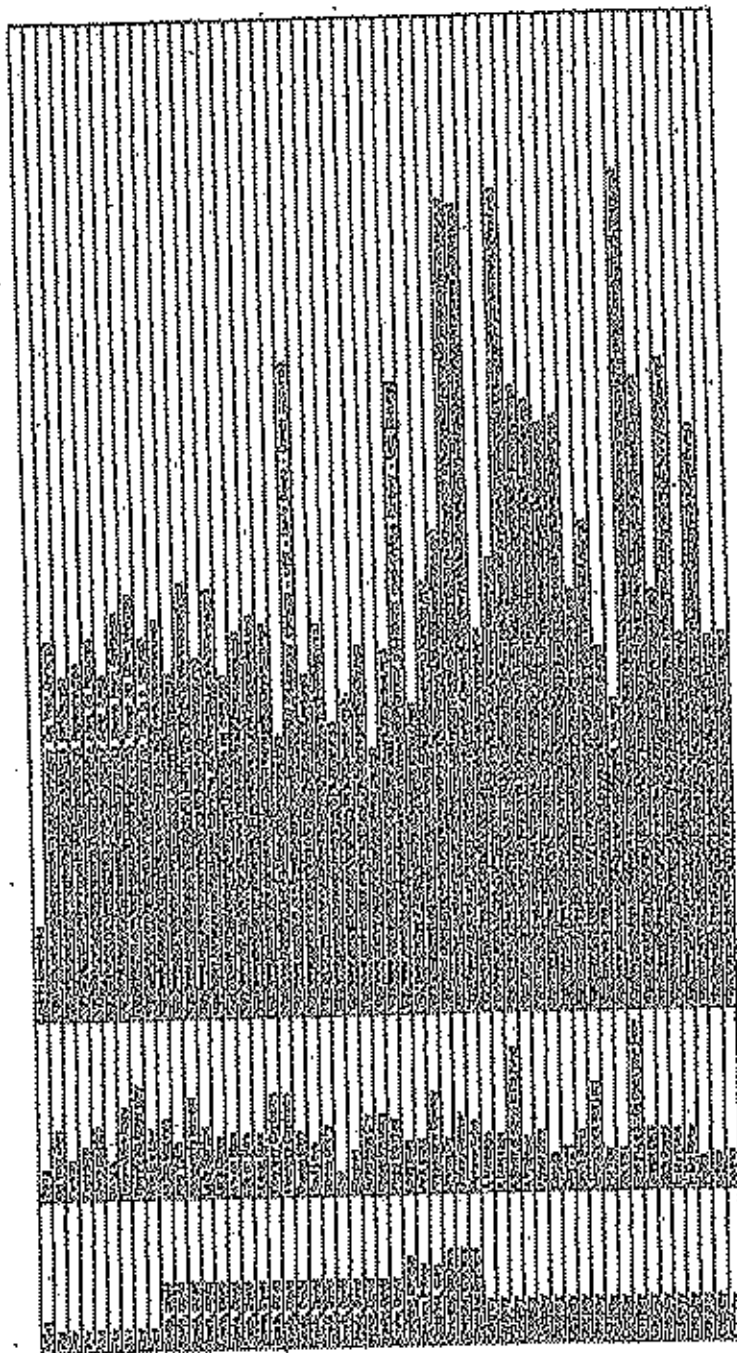


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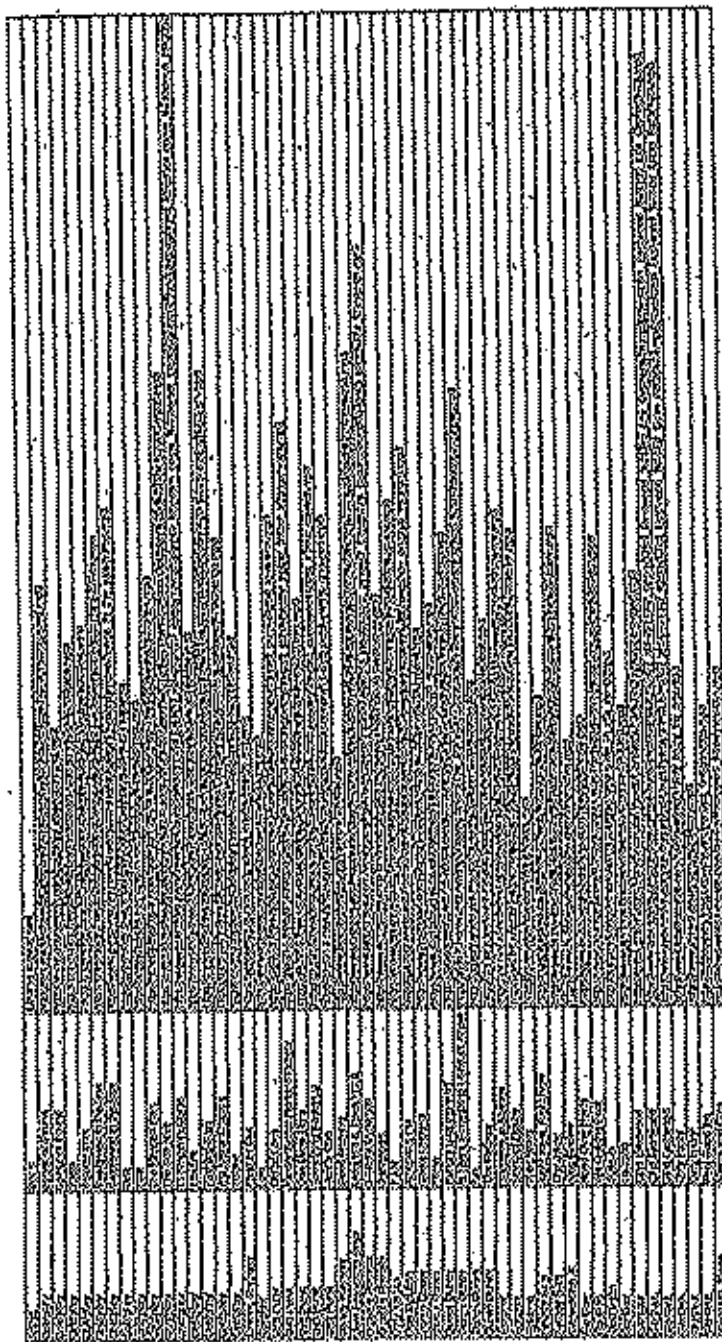


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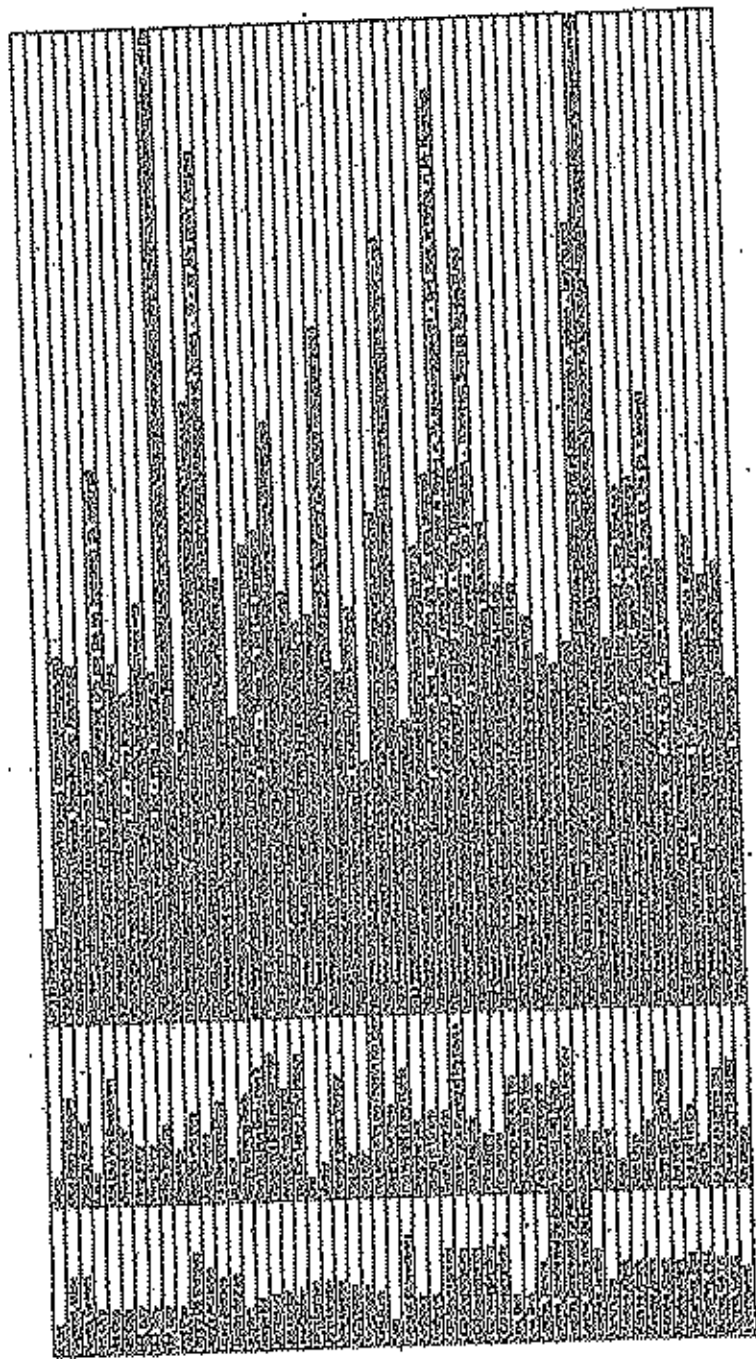


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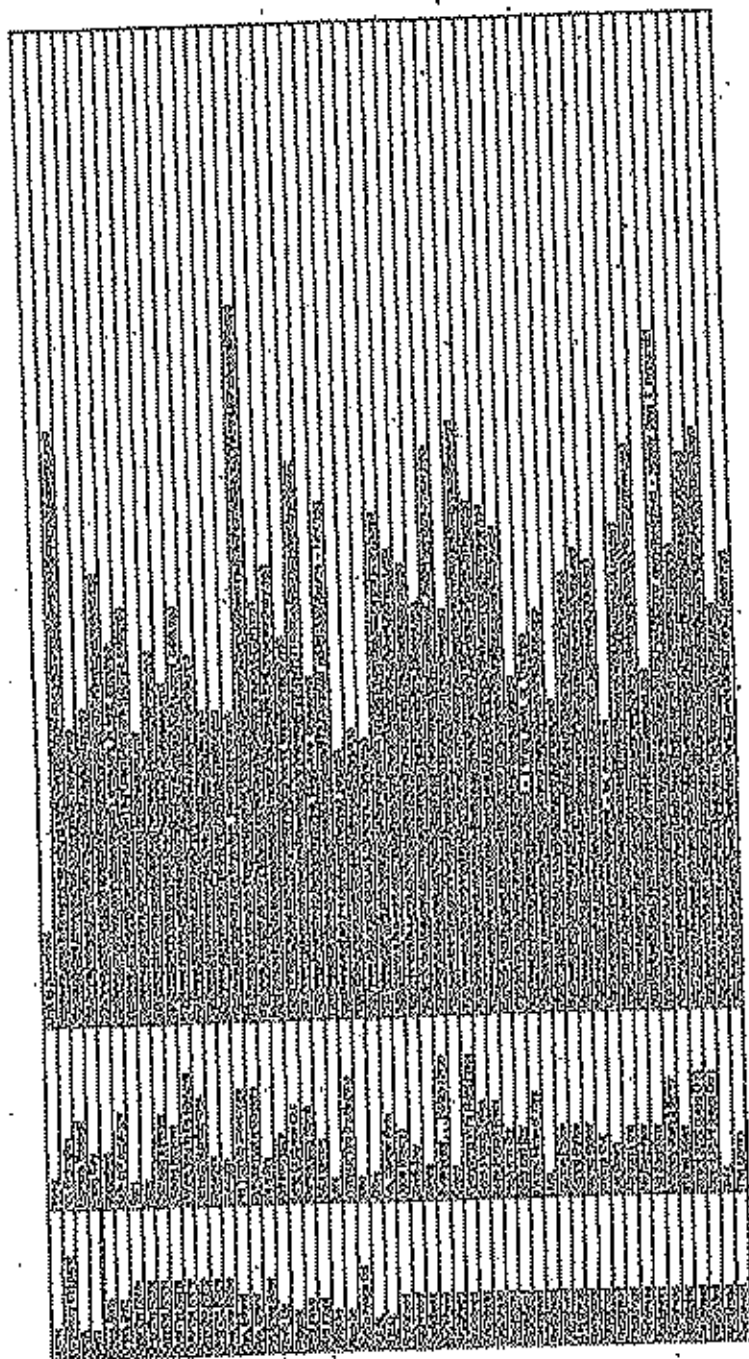


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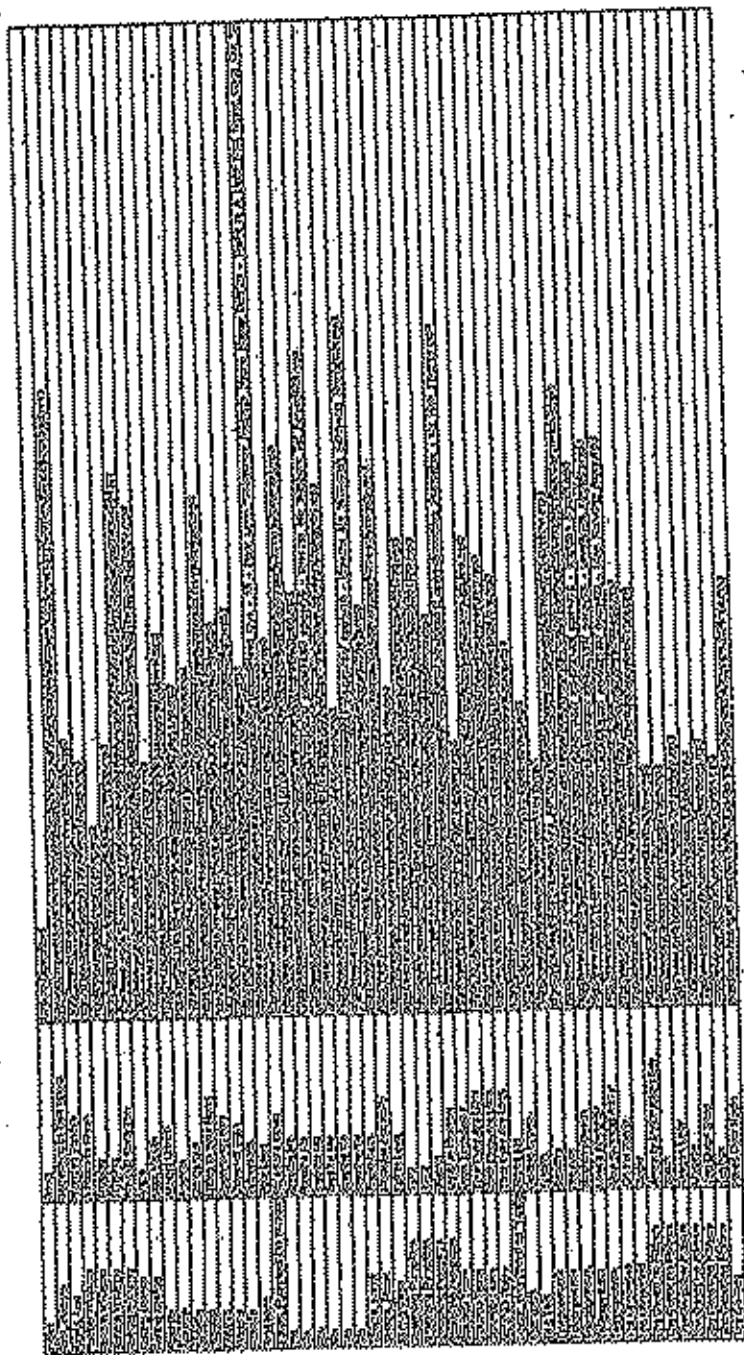


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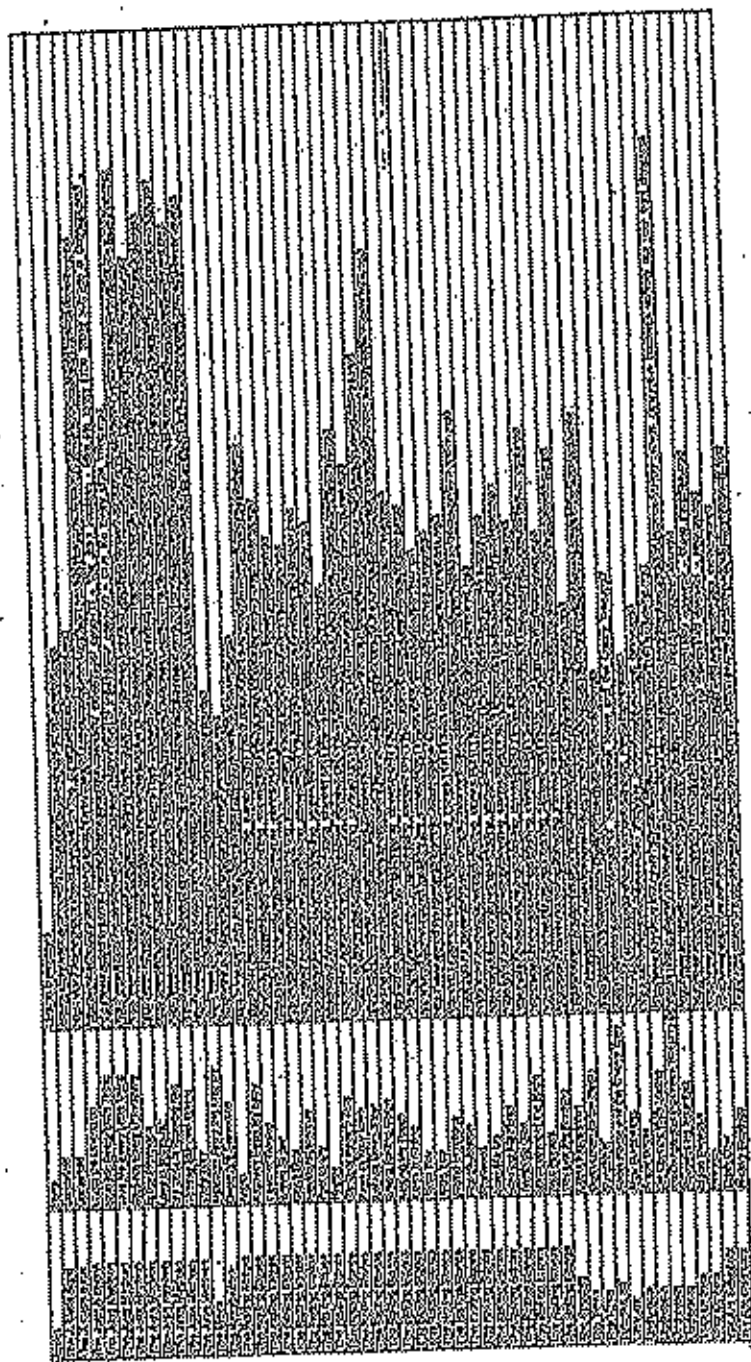


Exhibit A -- 10



Exhibit A -- 11

DREIER^{LLP}

ATTORNEYS AT LAW

The Casky Group

Ira S. Sacks Partner
Direct 212 652 5730
isacks@dreierllp.com

September 13, 2007

VIA FEDERAL EXPRESS

Steven B. Fabrizio, Esq.
Jenner & Block LLP
601 Thirteenth Street, NW
Suite 1200 South
Washington, DC 20005-3823

Re: MP3tunes, LLC

Dear Mr. Fabrizio,

We represent MP3tunes, LLC ("MP3tunes"). We write in response to your cease-and-desist letter, dated September 4, 2007 to MP3tunes, regarding your allegations that MP3tunes, through its websites, MP3tunes.com and Sideload.com, and its "Oboe Software Suite" is "copying and storing to its servers, indexing, publicly performing, and making available for download hundreds (if not thousands) of [your] client's copyrighted recordings in violation of the Copyright Act."

While we find your allegations baseless and believe that you failed to comply with the requirements of the Digital Millennium Copyright Act ("DMCA") when notifying our client of its alleged infringement, in an effort to resolve this matter and to fulfill our obligations under the DMCA, MP3tunes has removed the approximately 350 songs you provided with your cease-and-desist letter from availability for sideloading. If you provide another list with additional songs to which BMI and/or its affiliates represent they own the copyrights, MP3tunes will promptly remove those songs from availability for sideloading as well.

BMI needs to understand the function of MP3tunes and sideload.com. MP3tunes plays no role in what songs are designated for sideload.com by users of MP3tunes. None of the songs designated by users for sideloading are physically available on sideload.com. Rather, what is provided is a hyperlink.

Notwithstanding MP3tunes' continued willingness to resolve this matter amicably, your attempt to place the burden on MP3tunes to determine which of the songs on its website

409 Park Avenue New York, New York 10022
Telephone 212 320 6100 Facsimile 212 320 6101
Los Angeles Stamford Albany
www.dreierllp.com

Exhibit A -- 12

Steven B. Fabrizio, Esq.
 September 13, 2007
 Page 2 of 3

are infringing simply by providing (i) a link to the EMI website which provides a "non-exhaustive further listing of EMI's recording artists" and (ii) a representative list of songs which you demand be disabled, fails to comply with EMI's obligations under the DMCA. What is more, having quickly analyzed the list of songs that you attached to your letter, we believe that your assertion that "EMI has not authorized any of its recordings to be copied, distributed or performed" as is done on sideload.com and that "EMI has a good faith belief that use of the material in the manner complained of is not authorized by EMI, its respective agents or the law" is factually incorrect.

First, your notice is inadequate under the DMCA. Specifically, as you know, the 17 U.S.C. § 512(c)(3)(A) provides that:

To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

- (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
- (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
- (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
- (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
- (v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.
- (vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

Steven B. Fabrizio, Esq.
 September 13, 2007
 Page 3 of 3

Thus, while you correctly supplied a representative list of multiple copyrighted works located on a single site in your notification as per 17 U.S.C. § 512(c)(3)(A)(ii), you still must comply with the requirements of § 512(c)(3)(A)(iii) – that is, you must specifically identify the material that is to be removed or access to which is to be disabled. A representative list such as the one you have provided is insufficient to comply with 17 U.S.C. § 512(c)(3)(A)(iii).

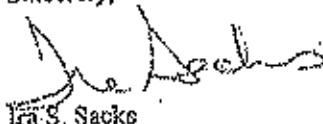
Moreover, we believe that some of the artists on your list and/or on your website are no longer represented by BMI; and that some songs you listed are freely available for digital download. For example, the first band that is listed in your spreadsheet is "Air". MP3tunes features an "Air" track – "Once Upon A Time" – on the first page of sidenav.com. That track is from the popular online music magazine, *Filter*, and is accessed by the URL <http://filter-mag.com/index.php?id=13977&c=6>. We have no reason to believe that the *Filter* track is anything but lawful.

Similarly, your list also includes the track "Nobody Move, Nobody Get Hurt" by the band "We Are Scientists" from the URL http://media.spin.com/features/band_of_the_day/audio/2005/11/nobody_move_nobody_get_hurt_hi.mp3. *Spin* is a popular online music magazine. All the labels distribute MP3s promotionally. We believe that it is likely that this track is such a promotional distribution and is lawfully available. The same is true for the tracks that you list from the *Paste Store*, which is a store which often distributes promotional tracks provided to them.

Nonetheless, as previously stated, if you send us a list of additional tracks to which BMI and its affiliates own the copyrights, provide information reasonably sufficient to permit our client to locate the material, and accurately represent that the listed tracks are not legally digitally available for copying (along with the remaining required elements of 17 U.S.C. § 512(c)(3)(A)), MP3tunes will disable those songs from sideloading as well.

Please feel free to contact me if you would like to discuss this matter further. This letter is written without prejudice to the rights, claims and/or defenses of MP3tunes or its affiliates, all of which are hereby expressly reserved.

Sincerely,



Ira S. Sacks

ISS/cw
 cc: Michael Robertson (via email)

Title	Primary Artist	Sideload song page
Crazy	Aerosmith	http://www.sideload.com/cb/track/?id=130760
Jaded	Aerosmith	http://www.sideload.com/cb/track/?id=270439
Janie's Got A Gun	Aerosmith	http://www.sideload.com/cb/track/?id=204652
Remember When	Alan Jackson	http://www.sideload.com/cb/track/?id=233760
Fallin'	Alicia Keys	http://www.sideload.com/cb/track/?id=100602
If I Ain't Got U	Alicia Keys	http://www.sideload.com/cb/track/?id=265787
Karma	Alicia Keys	http://www.sideload.com/cb/track/?id=326867
A Certain Romance	Arctic Monkeys	http://www.sideload.com/cb/track/?id=332348
Brainstorm	Arctic Monkeys	http://www.sideload.com/cb/track/?id=233716
Fake Tails of San Franc	Arctic Monkeys	http://www.sideload.com/cb/track/?id=108971
I Bet You Look Good On	Arctic Monkeys	http://www.sideload.com/cb/track/?id=93254
Mardy Bum	Arctic Monkeys	http://www.sideload.com/cb/track/?id=282689
The View From The Aste	Arctic Monkeys	http://www.sideload.com/cb/track/?id=182789
When The Sun Goes Dc	Arctic Monkeys	http://www.sideload.com/cb/track/?id=182792
This House is A Circus	Arctic Monkeys	http://www.sideload.com/cb/track/?id=271953
Teddy Picker	Arctic Monkeys	http://www.sideload.com/cb/track/?id=243874
Big Shot	Billy Joel	http://www.sideload.com/cb/track/?id=290474
Brenda and Eddie	Billy Joel	http://www.sideload.com/cb/track/?id=274458
You May Be Right	Billy Joel	http://www.sideload.com/cb/track/?id=63420
Dammit	Blink 182	http://www.sideload.com/cb/track/?id=281572
Adam's Song	Blink 182	http://www.sideload.com/cb/track/?id=308180
What's My Age Again?	Blink 182	http://www.sideload.com/cb/track/?id=95754
Anthem	Blink 182	http://www.sideload.com/cb/track/?id=308195
100 Years	Five for Fighting	http://www.sideload.com/cb/track/?id=230944
Everlong	Foo Fighters	http://www.sideload.com/cb/track/?id=144914
Watershed	Foo Fighters	http://www.sideload.com/cb/track/?id=118309
Weenie Beenie	Foo Fighters	http://www.sideload.com/cb/track/?id=118311
In The Air Tonight	Genesis/Phil Collins	http://www.sideload.com/cb/track/?id=308344
Against All Odds (Take	Genesis/Phil Collins	http://www.sideload.com/cb/track/?id=216030
Abacab	Genesis/Phil Collins	http://www.sideload.com/cb/track/?id=321906
Keep it Dark	Genesis/Phil Collins	http://www.sideload.com/cb/track/?id=321894
Mama	Genesis/Phil Collins	http://www.sideload.com/cb/track/?id=301391
The Lamb Lies Down On	Genesis/Phil Collins	http://www.sideload.com/cb/track/?id=321895
Paperlate	Genesis/Phil Collins	http://www.sideload.com/cb/track/?id=321902
I Heard It Through The	Gladys Knight	http://www.sideload.com/cb/track/?id=253174
Iris	Goo Goo Dolls	http://www.sideload.com/cb/track/?id=227208
Slide	Goo Goo Dolls	http://www.sideload.com/cb/track/?id=21181
Out of My Mind	James Blunt	http://www.sideload.com/cb/track/?id=174541
Tears and Rain	James Blunt	http://www.sideload.com/cb/track/?id=205559
Fire and Rain	James Taylor	http://www.sideload.com/cb/track/?id=315822
Jack and Diane	John Mellencamp	http://www.sideload.com/cb/track/?id=143945
Over the Rainbow	Judy Garland	http://www.sideload.com/cb/track/?id=242634
Wuthering Heights	Kate Bush	http://www.sideload.com/cb/track/?id=288007
Hang	Matchbox 20	http://www.sideload.com/cb/track/?id=210570
Real World	Matchbox 20	http://www.sideload.com/cb/track/?id=233768
Bent	Matchbox 20	http://www.sideload.com/cb/track/?id=109505
Dumb	Nirvana	http://www.sideload.com/cb/track/?id=195788
Lithium	Nirvana	http://www.sideload.com/cb/track/?id=227650
All Apologies	Nirvana	http://www.sideload.com/cb/track/?id=204646
Come As You Are	Nirvana	http://www.sideload.com/cb/track/?id=222532
Very Ape	Nirvana	http://www.sideload.com/cb/track/?id=297161

Be My Somebody	Norah Jones	http://www.sideload.com/cb/track/?id=223070
Broken	Norah Jones	http://www.sideload.com/cb/track/?id=223004
Little Room	Norah Jones	http://www.sideload.com/cb/track/?id=223067
Not Too Late	Norah Jones	http://www.sideload.com/cb/track/?id=223007
Wake Me Up	Norah Jones	http://www.sideload.com/cb/track/?id=233509
Close My Eyes Forever	Ozzy Osbourne	http://www.sideload.com/cb/track/?id=283192
Trouble	Pink	http://www.sideload.com/cb/track/?id=281180
Bicycle Race	Queen	http://www.sideload.com/cb/track/?id=168834
Crazy Little Thing Called Queen	Queen	http://www.sideload.com/cb/track/?id=326156
We Are The Champions	Queen	http://www.sideload.com/cb/track/?id=281663
Beller	Regina Spektor	http://www.sideload.com/cb/track/?id=106343
Edit	Regina Spektor	http://www.sideload.com/cb/track/?id=226559
Fidelity	Regina Spektor	http://www.sideload.com/cb/track/?id=104940
Lady	Regina Spektor	http://www.sideload.com/cb/track/?id=226554
On The Radio	Regina Spektor	http://www.sideload.com/cb/track/?id=235982
Semson	Regina Spektor	http://www.sideload.com/cb/track/?id=178874
Superfreak	Rick James	http://www.sideload.com/cb/track/?id=243693
Diamonds Are Forever	Shirley Bassey	http://www.sideload.com/cb/track/?id=242256
ABC	The Jackson 5	http://www.sideload.com/cb/track/?id=207411
Papa Gene's Blues	The Monkees	http://www.sideload.com/cb/track/?id=332242
Don't Stand So Close to	The Police	http://www.sideload.com/cb/track/?id=309023
Every Breath You Take	The Police	http://www.sideload.com/cb/track/?id=99058
Message In A Bottle	The Police	http://www.sideload.com/cb/track/?id=224522
Roxanna	The Police	http://www.sideload.com/cb/track/?id=15209
Synchronicity II	The Police	http://www.sideload.com/cb/track/?id=287778
The Bed's Too Big With	The Police	http://www.sideload.com/cb/track/?id=320807
Truth Hits Everybody	The Police	http://www.sideload.com/cb/track/?id=287781
Angie	The Rolling Stones	http://www.sideload.com/cb/track/?id=132462
Hot Stuff	The Rolling Stones	http://www.sideload.com/cb/track/?id=274374
Start Me Up	The Rolling Stones	http://www.sideload.com/cb/track/?id=186173
Ain't Too Proud To Beg	The Temptations	http://www.sideload.com/cb/track/?id=253179
A Box Full of Sharp Objects	The Used	http://www.sideload.com/cb/track/?id=280210
All That I've Got	The Used	http://www.sideload.com/cb/track/?id=280196
I Caught Fire (In Your Eyes)	The Used	http://www.sideload.com/cb/track/?id=280194
I'm A Fake	The Used	http://www.sideload.com/cb/track/?id=280192
Take It Away	The Used	http://www.sideload.com/cb/track/?id=280193
Light With A Sharpened	The Used	http://www.sideload.com/cb/track/?id=280200
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Jambi	Tool	http://www.sideload.com/cb/track/?id=227904
Fast Car	Tracy Chapman	http://www.sideload.com/cb/track/?id=252030
Talkin' 'Bout A Revolution	Tracy Chapman	http://www.sideload.com/cb/track/?id=270431
For My Lover	Tracy Chapman	http://www.sideload.com/cb/track/?id=301787
Baby Can I Hold You	Tracy Chapman	http://www.sideload.com/cb/track/?id=207460
Duelin' Banjos		http://www.sideload.com/cb/track/?id=187736

Book 1	Book 2	Book 3	Book 4	Book 5	Book 6	Book 7	Book 8	Book 9	Book 10	Book 11	Book 12	Book 13	Book 14	Book 15	Book 16	Book 17	Book 18	Book 19	Book 20	Book 21	Book 22	Book 23	Book 24	Book 25	Book 26	Book 27	Book 28	Book 29	Book 30	Book 31	Book 32	Book 33	Book 34	Book 35	Book 36	Book 37	Book 38	Book 39	Book 40	Book 41	Book 42	Book 43	Book 44	Book 45	Book 46	Book 47	Book 48	Book 49	Book 50	Book 51	Book 52	Book 53	Book 54	Book 55	Book 56	Book 57	Book 58	Book 59	Book 60	Book 61	Book 62	Book 63	Book 64	Book 65	Book 66	Book 67	Book 68	Book 69	Book 70	Book 71	Book 72	Book 73	Book 74	Book 75	Book 76	Book 77	Book 78	Book 79	Book 80	Book 81	Book 82	Book 83	Book 84	Book 85	Book 86	Book 87	Book 88	Book 89	Book 90	Book 91	Book 92	Book 93	Book 94	Book 95	Book 96	Book 97	Book 98	Book 99	Book 100	Book 101	Book 102	Book 103	Book 104	Book 105	Book 106	Book 107	Book 108	Book 109	Book 110	Book 111	Book 112	Book 113	Book 114	Book 115	Book 116	Book 117	Book 118	Book 119	Book 120	Book 121	Book 122	Book 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345	Book 346	Book 347	Book 348	Book 349	Book 350	Book 351	Book 352	Book 353	Book 354	Book 355	Book 356	Book 357	Book 358	Book 359	Book 360	Book 361	Book 362	Book 363	Book 364	Book 365	Book 366	Book 367	Book 368	Book 369	Book 370	Book 371	Book 372	Book 373	Book 374	Book 375	Book 376	Book 377	Book 378	Book 379	Book 380	Book 381	Book 382	Book 383	Book 384	Book 385	Book 386	Book 387	Book 388	Book 389	Book 390	Book 391	Book 392	Book 393	Book 394	Book 395	Book 396	Book 397	Book 398	Book 399	Book 400	Book 401	Book 402	Book 403	Book 404	Book 405	Book 406	Book 407	Book 408	Book 409	Book 410	Book 411	Book 412	Book 413	Book 414	Book 415	Book 416	Book 417	Book 418	Book 419	Book 420	Book 421	Book 422	Book 423	Book 424	Book 425	Book 426	Book 427	Book 428	Book 429	Book 430	Book 431	Book 432	Book 433	Book 434	Book 435	Book 436	Book 437	Book 438	Book 439	Book 440	Book 441	Book 442	Book 443	Book 444	Book 445	Book 446	Book 447	Book 448	Book 449	Book 450	Book 451	Book 452	Book 453	Book 454	Book 455	Book 456	Book 457	Book 458	Book 459	Book 460	Book 461	Book 462	Book 463	Book 464	Book 465	Book 466	Book 467	Book 468	Book 469	Book 470	Book 471	Book 472	Book 473	Book 474	Book 475	Book 476	Book 477	Book 478	Book 479	Book 480	Book 481	Book 482	Book 483	Book 484	Book 485	Book 486	Book 487	Book 488	Book 489	Book 490	Book 491	Book 492	Book 493	Book 494	Book 495	Book 496	Book 497	Book 498	Book 499	Book 500	Book 501	Book 502	Book 503	Book 504	Book 505	Book 506	Book 507	Book 508	Book 509	Book 510	Book 511	Book 512	Book 513	Book 514	Book 515	Book 516	Book 517	Book 518	Book 519	Book 520	Book 521	Book 522	Book 523	Book 524	Book 525	Book 526	Book 527	Book 528	Book 529	Book 530	Book 531	Book 532	Book 533	Book 534	Book 535	Book 536	Book 537	Book 538	Book 539	Book 540	Book 541	Book 542	Book 543	Book 544	Book 545	Book 546	Book 547	Book 548	Book 549	Book 550	Book 551	Book 552	Book 553	Book 554	Book 555	Book 556	Book 557	Book 558	Book 559	Book 560	Book 561	Book 562	Book 563	Book 564	Book 565	Book 566	Book 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September 13, 2007

VIA ELECTRONIC MAIL
AND U.S. MAIL

Ira S. Sacks, Esq.
Dreier LLP
499 Park Avenue
New York, NY 10022

Re: *MP3tunes Infringement of EMI Works*

Dear Ira:

Thank you for your letter of September 13, 2007. It is not our intention to engage in an extended exchange of letters. However, because your client appears to fundamentally misunderstand the DMCA, in an effort to avoid litigation born of misunderstanding, we offer the four observations set forth below. Beyond that, we invite MP3tunes to make a substantive proposal both to redress past infringement of EMI works and to ensure that there will be no future infringement of EMI works. When Michael Robertson and I spoke last week, it was my impression that MP3tunes would be making such a proposal. If MP3tunes does not intend to make a meaningful proposal to resolve this matter, kindly let us know and we will proceed accordingly.

As for the substance of your September 13 letter:

o First, respectfully, you are simply wrong in your interpretation of the DMCA. While you correctly recite the text of § 512(c)(3), you completely ignore § 512(d), which addresses information location tools. To the extent MP3tunes can take advantage of the DMCA at all, it must respond to notices compliant under § 512(d). As you undoubtedly know, § 512(d)(3) expressly modifies § 512(c)(3)(A)(iii) on the very issue of alleged non-compliance you refer in your letter. In relevant part, § 512(d)(3) provides that for purposes of § 512(d):

the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

17 U.S.C. § 512(d)(3) (emphasis added); see also S.R. Rep. No. 105-190, at 47-48 (1998) ("The reference to 'infringing activity' is intended to refer to wrongful activity that is occurring at the

Ira S. Sachs, Esq.
September 13, 2007
Page 2

location to which the link or reference refers ... [and] the information submitted by the complaining party under subsection (c)(3)(A)(iii) is identification of the reference or link to infringing material or activity"). Accordingly, our notice is absolutely compliant with the DMCA in all respects.

Second, we agree with the acknowledgment in your September 13 letter, at page 3, that we have "correctly supplied a representative list of multiple copyrighted works located on a single site in [our] notification as per 17 U.S.C. § 512(c)(A)(iii)." MP3tunes, however, does not appear to grasp the legal implications of that. The DMCA does not provide "safe harbor" just because a service provider responds to a notification by blocking access to the specifically identified works on a representative list. The statutory text and the legislative history make crystal clear that, once a copyright holder has provided a compliant "representative list" of its works, the obligation shifts to the service provider to remove or disable access to *all* copyrighted works owned by that copyright holder. The pertinent legislative history is as follows:

Where multiple works of a single online site are covered by a single notification, a representative list of such works at that site is sufficient. Thus, where a party is operating an unauthorized Internet jukebox from a particular site, it is not necessary for a compliant notification to list every musical composition or sound recording that has been or could be infringed at that site, so long as a representative list of those compositions or recordings is provided so that the service provider can understand the nature and scope of the infringement being claimed.

S.R. Rep. No. 105-390, at 46 (emphasis added); H.R. Rep. No. 105-551, at 55 (1998) (same); see also, e.g., *ALS Scan, Inc. v. Remedy Communications, Inc.*, 239 F.3d 619, 625 (4th Cir. 2001) (DMCA safe harbor "is not presumptive, but granted only to 'innocent' service providers who can prove they do not have actual or constructive knowledge of the infringement"; eligibility for safe harbor "disappears at the moment the service provider loses its innocence, i.e., at the moment it becomes aware that a third party is using its system to infringe"). Therefore, MP3tunes' commitment to remove the specific links identified on our representative list is not an act of compliance, but rather an acknowledgment of non-compliance. EMI has provided more than sufficient notice such that MP3tunes can understand the nature and scope of the infringement being claimed. If MP3tunes wants any argument as to compliance with § 512(d)(3), it must act accordingly. As observed below, it has not.

Third, as of this morning, countless EMI works, including works that were identified in our notice, and the works of EMI artists who were identified in the notice, continue to be infringed by and through MP3tunes. MP3tunes is liable for each of these infringements.

Fourth, many in your client's position conveniently view the DMCA as providing safe harbor as long as copyright infringement notices are appropriately responded to. That is not correct. Whether or not notices are sent to or responded to by a service provider, the DMCA

Erin D. Sachs, Esq.
September 12, 2007
Page 3


disqualifies a service provider from all safe harbor if that service provider either: (i) has "actual knowledge that the material or activity is infringing," 17 U.S.C. § 512(d)(1)(A); or (ii) is "aware of facts or circumstances from which infringing activity is apparent," 17 U.S.C. § 512(d)(1)(B); or (iii) "receives[] a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity," 17 U.S.C. § 512(d)(2). Separate and apart from its failure to comply with BMI's notice, MP3tunes would be disqualified from DMCA safe harbor based on each of these provisions. Moreover, in addition to BMI works that are protected under the federal copyright laws, MP3tunes infringes and is responsible for the infringement of innumerable BMI works that were first fixed prior to February 1972 ("pre-72 works") and which are protected under state law. *E.g., Capital Records, Inc. v. Naxos of America, Inc.*, 4 N.Y.3d 549, 830 N.E.2d 250 (N.Y. 2005). As the DMCA is a provision of the United States Copyright Act, it provides no conceivable protection for MP3tunes' infringement of BMI's pre-72 works.

"The complex maelstrom of cyberspatial communications may create difficult legal issues; but not in this case." *UAG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 350 (S.D.N.Y. 2000) (Rakoff, J.). Judge Rakoff's comment is equally applicable here. MP3tunes is building a business by leveraging the popularity of creative works that MP3tunes did not create and does not own. It will be held liable for copyright infringement under federal and state laws.

If MP3tunes has made an informed decision to litigate the issue of its copyright liability, so be it. If, on the other hand, MP3tunes has a meaningful proposal to make for an overall resolution, the time to make it is now.

Finally, BMI is compelled to expressly reserve all of its rights with respect to the conflict of interest your firm, Dreier LLP, has in representing MP3tunes in a matter adverse to BMI. Dreier LLP currently is representing BMI's affiliate, Caroline Records, Inc., in an ongoing litigation in the New York State Supreme Court captioned *Caroline Records v. Joliet*. The rules of professional conduct governing lawyers practicing in New York prohibit Dreier LLP from acting adverse to its BMI client absent receiving an express waiver from BMI, which Dreier LLP has neither sought nor received.

Yours truly,


Steven B. Fabrizio

cc: Amirah Mohamud, Esq.
Scott Schreiber, Esq.
BMI Music North America

Andrew H. Bart, Esq.
Thomas J. Ferrelli, Esq.
Jenner & Block LLP

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JENNER & BLOCK

October 25, 2007

BY OVERNIGHT DELIVERY

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Chicago
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Andrew H. Bitt
abitt@jenner.com

Re: *EMI Records / Infringement of Copyrighted Works*

Dear Ms. Richards:

We are counsel for EMI Music Group North America, whose record labels include (but are not limited to) Capitol, Priority, Blue Note, EMI, Virgin, Astralwerks (collectively, "EMI"). EMI is the owner of copyright, exclusive rights under copyright, or related common law and statutory rights, in sound recordings. Among EMI's copyrights are works of some of the world's most popular artists, including The Beatles, David Bowie, Coldplay, and many others.

MP3Tunes, through its websites, MP3Tunes.com and Sideload.com, and its "Oboe Software Suite" (collectively, "MP3Tunes"), among other things, is copying and storing to its servers, indexing, publicly performing, and making available for download hundreds (if not thousands) of our client's copyrighted works in violation of the Copyright Act. For example, MP3Tunes.com provides (based on a user's search query) URL links to "source sites" that host unauthorized music files. Through the "Oboe Software Suite" and the "Oboe Sideload Plug-in," which MP3Tunes provides for no charge at MP3Tunes.com and Sideload.com, MP3Tunes' users can click a button MP3Tunes presents beside every link; when they do so, MP3Tunes automatically and instantly copies and "sideloads" the selected music from the source site into the user's Oboe locker on the MP3Tunes.com website (which offers free storage and indexing of the user's "sideloaded" files). Thus, MP3Tunes unlawfully copies, and enables and induces its users to unlawfully copy, countless works by EMI artists. All of these unauthorized music files are available for download or immediate playback via the MP3Tunes.com website's proprietary integrated online audio player, and can be further transferred to most portable music devices, or copied to a compact disc. Searches using recordings by other EMI artists returned similar results. However, EMI has not authorized any of its works to be copied, distributed, or performed in this manner on or by MP3Tunes or its users.

As we are certain that you are aware, the foregoing conduct constitutes copyright infringement under the United States Copyright Act and under laws of other countries, international law, and/or international treaty obligations. For a variety of reasons, MP3Tunes is not protected by any of the "safe-harbors" of the Digital Millennium Copyright Act ("DMCA").

Ms. Emily Richards
 October 25, 2007
 Page 2

international law, and/or international treaty obligations. For a variety of reasons, MP3Tunes is not protected by any of the "safe-harbors" of the Digital Millennium Copyright Act ("DMCA").

Without waiver of the foregoing position and without conceding that MP3Tunes is entitled to any of the protections of the DMCA, including that it is a "Service Provider," falls within any of the enumerated categories of Section 512(a)-(d), or has effectively complied with any of the requirements contained therein, we are enclosing herewith a CD-ROM containing a spreadsheet identifying, by artist, song title and - consistent with 17 U.S.C. § 512(d) - URL location, a representative sample, pursuant to 17 U.S.C. § 512(c)(3)(A)(ii), of EMI Publishing's copyrighted works that are copied, performed, stored, distributed, and made available for download on or by MP3Tunes. We demand that MP3Tunes immediately take the following actions with respect to each work identified in the attached spreadsheet: (1) remove or disable access to the work; (2) notify the MP3Tunes end user or uploader of the infringement(s); and (3) take appropriate action against the account holder pursuant to the MP3Tunes Terms of Use and End User Agreement. Please confirm in writing that you have done so. Additionally, please provide us with a complete accounting of all of the identified EMI Publishing works that have been copied, performed or distributed by MP3Tunes including the number of times each work has been accessed by MP3Tunes users.

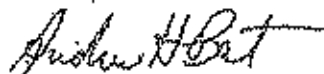
The enclosed representative list reflects only a small portion of the total number of infringing EMI Publishing works contained on MP3Tunes. Our initial investigation suggests that hundreds, if not thousands, of additional copies of EMI Publishing's copyrighted works are being made available on or by MP3Tunes, with more being copied and made available daily. Accordingly, pursuant to 17 U.S.C. § 512(c)(3)(A)(ii), based on the representative list we are providing, MP3Tunes is obligated to remove all of EMI Publishing's copyrighted works, even those not specifically identified on the attached. See S. Rep. No. 105-190, at 46 (1998) (requiring operator of site to take action upon being provided with a "representative list" sufficient for the operator to "understand the nature and scope of the infringement being claimed"). A non-exhaustive further listing of songwriters whose works are owned by EMI Publishing can be found at <http://www.emigroup.com/About/Music/EMI+Music+Publishing+songwriters.htm>. In addition to the foregoing, we demand that MP3Tunes immediately take any and all appropriate action to ensure that each and every one of the works identified in the attached spreadsheet, and all other EMI Publishing copyrighted works, remain unavailable on or through MP3Tunes.

The information in this notification is accurate and we have a good faith belief that use of the material in the manner complained of is not authorized by EMI Publishing, its respective agents, or the law. I further hereby state, under penalty of perjury, that we are authorized to act on behalf of EMI Publishing as set forth in this letter.

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Ms. Emily Richards
October 25, 2007
Page 3

Very truly yours,

A handwritten signature in cursive script, appearing to read "Andrew H. Bart".

Andrew H. Bart

Enclosure

cc: Michael Abitbol, *EMI Entertainment World, Inc.*

JENNER & BLOCK

October 25, 2007

BY OVERNIGHT DELIVERY

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Re: *EMI Entertainment World / Infringement of Copyrighted Works*

Dear Ms. Richards:

We are counsel for EMI Entertainment World, Inc. ("EMI Publishing"), a division of EMI Group and one of the world's leading music publishers. EMI Publishing is the owner of copyright, exclusive rights under copyright, or related common law and statutory rights, in musical compositions. Among the over one million compositions owned or controlled by EMI Publishing are some of the most popular songs of the past and the present, including "Over the Rainbow," "Higher Ground," "Start Me Up," "Come As You Are," "I Bet You Look Good on the Dancefloor" and many others.

MP3Tunes, through its websites, MP3Tunes.com and Sideload.com, and its "Oboe Software Suite" (collectively, "MP3Tunes"), among other things, is copying and storing to its servers, indexing, publicly performing, and making available for download hundreds (if not thousands) of our client's copyrighted works in violation of the Copyright Act. For example, MP3Tunes.com provides (based on a user's search query) URL links to "source sites" that host unauthorized music files. Through the "Oboe Software Suite" and the "Oboe Sideload Plug-in," which MP3Tunes provides for no charge at MP3Tunes.com and Sideload.com, MP3Tunes users can click a button MP3Tunes presents beside every link; when they do so, MP3Tunes automatically and instantly copies and "sideloads" the selected music from the source site into the user's Oboe locker on the MP3Tunes.com website (which offers free storage and indexing of the user's "sideloaded" files). Thus, MP3Tunes unlawfully copies, and enables and induces its users to unlawfully copy, countless works owned by EMI Publishing, such as "If I Ain't Got U" and "Janie's Got A Gun." All of these unauthorized music files are available for download or immediate playback via the MP3Tunes.com website's proprietary integrated online audio player, and can be further transferred to most portable music devices, or copied to a compact disc. Searches using songs by other EMI Publishing songwriters returned similar results. However, EMI Publishing has not authorized any of its works to be copied, distributed, or performed in this manner on or by MP3Tunes or its users.

As we are certain that you are aware, the foregoing conduct constitutes copyright infringement under the United States Copyright Act and under laws of other countries.

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Without waiver of the foregoing position and without conceding that MP3Tunes is entitled to any of the protections of the DMCA, including that it is a "Service Provider," falls within any of the enumerated categories of Section 512(a)-(d), or has effectively complied with any of the requirements contained therein, we are enclosing herewith a CD-ROM containing a spreadsheet identifying, by artist, song title and - consistent with 17 U.S.C. § 512(d) - URL location, a representative sample, pursuant to 17 U.S.C. § 512(c)(3)(A)(ii), of EMI's copyrighted works that are copied, performed, stored, distributed, and made available for download on or by MP3Tunes. We demand that MP3Tunes immediately take the following actions with respect to each work identified in the attached spreadsheet: (1) remove or disable access to the work; (2) notify the MP3Tunes end user or uploader of the infringement(s); and (3) take appropriate action against the account holder pursuant to the MP3Tunes Terms of Use and End User Agreement. Please confirm in writing that you have done so. Additionally, please provide us with a complete accounting of all of the identified EMI works that have been copied, performed or distributed by MP3Tunes including the number of times each work has been accessed by MP3Tunes users.

The enclosed representative list reflects only a small portion of the total number of infringing EMI works contained on MP3Tunes. Our initial investigation suggests that hundreds, if not thousands, of additional copies of EMI's copyrighted works are being made available on or by MP3Tunes, with more being copied and made available daily. Accordingly, pursuant to 17 U.S.C. § 512(c)(3)(A)(ii), based on the representative list we are providing, MP3Tunes is obligated to remove all of EMI's copyrighted works, even those not specifically identified on the attached. See S. Rep. No. 105-190, at 46 (1998) (requiring operator of site to take action upon being provided with a "representative list" sufficient for the operator to "understand the nature and scope of the infringement being claimed"). Non-exhaustive further listings of artists whose works are owned by EMI can be found at <http://www.capitolrecords.com/artists/>, <http://www.virginrecords.com/home/artists.html>, <http://www.bluenote.com/artists.asp>, http://www.narada.com/artist_page.htm, and <http://www.astralwerks.com/>. In addition to the foregoing, we demand that MP3Tunes immediately take any and all appropriate action to ensure that each and every one of the works identified in the attached spreadsheet, and all other EMI copyrighted works, remain unavailable on or through MP3Tunes.

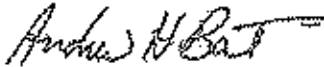
EMI further notes that MP3Tunes infringes and is responsible for the infringement of EMI works that were first fixed prior to February 1972 ("pre-72 works") and which are protected under state law. E.g., *Capitol Records, Inc. v. Naxos of America, Inc.*, 830 N.E.2d 250 (N.Y. 2005). As the DMCA is a provision of the United States Copyright Act, it provides no protection for MP3Tunes' infringement of EMI's pre-72 works.

The information in this notification is accurate and we have a good faith belief that use of the material in the manner complained of is not authorized by EMI, its respective agents, or the law. I further hereby state, under penalty of perjury, that we are authorized to act on behalf of EMI as set forth in this letter.

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Very truly yours,

A handwritten signature in cursive script, appearing to read "Andrew H. Bart".

Andrew H. Bart

Enclosure

cc: Alasdair McMullan, Esq., *EMI Music North America*
Scott Schreiber, Esq., *EMI Music North America*